(11)

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1944.

No. 718

COMMERCIAL NATIONAL BANK IN SHREVEPORT,
Petitioner,

versus

R. C. PARSONS, RECEIVER OF COMMERCIAL NATIONAL BANK OF SHREVEPORT,

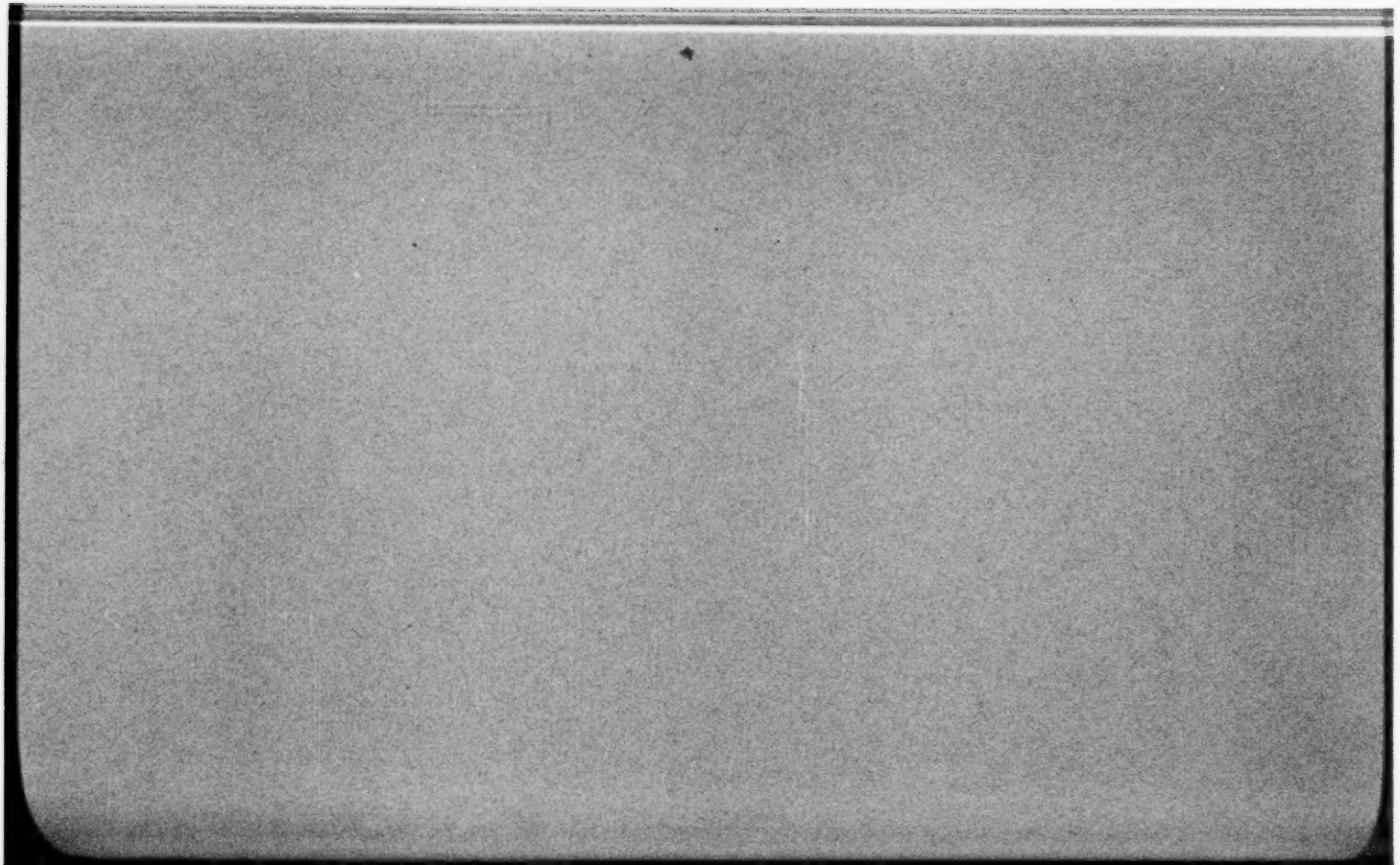
and

RANDLE T. MOORE ET AL., AS STOCKHOLDERS' COMMITTEE OF COMMERCIAL NATIONAL BANK OF SHREVEPORT,
Respondents.

BRIEF OF STOCKHOLDERS' COMMITTEE ON OPPOSITION TO PETITION FOR CERTIORARI TO UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

OTIS W. BULLOCK,
Attorney for Stockholders' Committee.

O. W. & B. D. BULLOCK,
Of Counsel.



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MISCELLANEOUS

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MAY IT PLEASE THE COURT:

Petitioner prays for certiorari to the Fifth Circuit Court of Appeals, alleging that the decision of said court is erroneous in the following respects:

1. Enlarges the rights of appellees in the absence of cross-appeal;

2. Disregards express admissions made in trial court and on appeal by counsel for appellees;

3. Conflicts on important question of local law with applicable local decisions;

4. Conflicts on important question of substantive law with applicable decisions of other Circuit Courts of Appeals;

5. Conflicts on important question arising in administration of affairs of embarrassed national banks with applicable local law.

The petition for certiorari is without merit, because the decision of the Circuit Court of Appeals is fully supported by the record and abundant legal precedents.

I

SUITS IN EQUITY ARE TRIED DE NOVO ON APPEAL UPON THE ENTIRE RECORD AND EVIDENCE, REGARDLESS OF THE ABSENCE OF CROSS-APPEAL OR ASSIGNMENT OF ERRORS.

The suit is one in equity between two national banks, involving the liquidation and settlement by one of the affairs of the other under a contract, and the relief sought is an accounting. The decision of the District Court disposed of several separate and distinct demands, some against and others in favor of the appellant bank, which appealed from the whole judgment and designated the entire record to be included in the transcript of appeal, the designation reading as follows (Tr. 782):

> "The Commercial National Bank in Shreveport, the appellant, hereby designates the entire record, proceedings and evidence, in this cause to be contained in the record on appeal."

There was no cross-appeal by appellees.

The law applicable is stated in 5 C. J. S. § 1526(a) in the following language:

> " . . . suits in equity are tried de novo on appeal upon the entire record and evidence. The appellate court itself will sift the whole evidence and determine what the finding of the trial court should have been upon such evidence as was competent and proper. The court below and the appellate court are judges of both law and fact."

In Hopkins v. Texas Company, 62 F. (2d) 691, certiorari denied 78 L. Ed. 547; 290 U. S. 629, the Tenth Circuit Court of Appeals said:

> "An objection to the consideration of the case on the merits was that the appellant has not assigned sufficient specifications of error; but we think the objection is not well taken. An appeal in an equity suit brings the case up de novo and in order to avoid injustice a plain error, even though not assigned, should be considered. Central Improvement Co. v. Cambria Steel Co. (C. C. A.) 201 F. 811; National Acc. Society v. Spiro (C. C. A.) 78 F. 774."

In Mills Novelty Company v. Monarch Tool & Manufacturing Co., 49 F. (2d) 28, certiorari denied 284 U. S. 662; 76 L. Ed. 561, the Sixth Circuit Court of Appeals said:

> "On the argument here, defendant presents several of the defenses urged below; appellant insists we should consider only the questions which the District

> Court decided against it. This is not the rule. Appeals in equity bring up the whole case (with certain inferences in favor of the decree below), and the decree below should be sustained if it was right for any reason. Linde Co. v. Morse Co. (C. C. A. 2) 246 F. 834, 837. It follows that we must consider all those defenses which might be good as against the relief otherwise to be given."

In Edwards v. Lain, 112 F. (2d) 343, the Seventh Circuit Court of Appeals said:

> "The true rule in this respect is set forth in Keller v. Potomac Company, 261 U. S. 428, 43 S. Ct. 445, 449, 67 L. Ed. 731: '"In that procedure (in equity), an appeal brings up the whole record and the appellate court is authorized to review the evidence and make such order or decree as the court of first instance ought to have made, giving proper weight to the findings on disputed issues of fact which should be accorded to a tribunal which heard the witnesses' ".

In Ferguson v. Omaha & S. W. R. Co., 227 Fed. 513, the Eighth Circuit Court of Appeals said:

> "The appellants ask, in the event that this court shall sustain the appeal, that it then consider and determine the case upon the merits, though the lower court did not do so. When the entire record of a cause, including all the testimony therein, is before an appellate court upon appeal in equity, such appellate court may consider the case upon the merits, and either enter a final decree, or remand the cause to the lower court, with directions to do so, though the lower court has not considered the merits."

In Boynton v. Moffat Tunnel Improvement District, 57 F. (2d) 772, certiorari denied 287 U. S. 620; 77 L. Ed. 538, the Tenth Circuit Court of Appeals said:

> "... and since appeals in equity are trials de novo, and since equity speaks as of the present (Richardson v. Green, C. C. A. 9, 61 F. 423; City of Denver v. Mercantile Trust Co., C. C. A. 8, 201 F. 790; 21 C. J. 663), we need not explore the effect of that order. Our task is to determine upon the facts drawn onto the record by stipulation of the parties, whether the cause should stand dismissed, whether it should be reinstated and stayed, or whether the plaintiffs are entitled to a decree at our hands, on the record."

On appeal in admiralty, as in equity, there is a trial de novo upon the entire record and evidence, and the jurisprudence is that a cross-appeal is not required.

In Irvine v. The Hesper, 122 U. S. 256; 30 L. Ed. 1175, it was held that an appeal in admiralty from the district court to the circuit court of appeals vacated the decree of the former and opened the case for a trial de novo in the latter court. The Supreme Court said:

> "We do not think that the fact that the claimants did not appeal from the decree of the district court alters the rule. When the libellants appealed, they did so in view of the rule, and took the risk of the result of a trial of the case de novo. The whole case was opened by their appeal, as much as it would have been if both parties had appealed, or if the appeal had been taken only by the claimants."

In Langnes v. Green, 282 U. S. 531; 75 L. Ed. 520, reviewing the jurisprudence applicable to the petition for certiorari in this case, the Supreme Court said:

> "The preliminary objection is urged by petitioner, that since the decision below upon this point was against respondent and he has not applied for certiorari, the point is not open here for consideration; but

> the objection is without merit, as a brief review of the decisions of this court will disclose."

In Standard Oil Company v. Southern Pacific Company, 268 U. S. 146; 69 L. Ed. 890, the Supreme Court said:

> "On appeal in admiralty, there is a trial de novo. The whole case was opened in the circuit court of appeals by the appeal of the Southern Pacific Company as much as it would have been if the Director General had also appealed."

In Reid v. Fargo, 241 U. S. 544; 60 L. Ed. 1156, the rule applicable to the petition now before the court is stated in the syllabus, which reads as follows:

> "An appeal to a Federal circuit court of appeals from a final decree of a district court in a suit in admiralty brings the case before it for a trial de novo so that the court may review an interlocutory decree therein which was not appealed from, and allow a recovery against a party who was dismissed by that decree, and may review both interlocutory and final decrees so far as essential to grant relief to a party who had not appealed from either decree."

II

DECISION OF CIRCUIT COURT OF APPEALS ON TAX MATTER NOT IN CONFLICT WITH APPLICABLE LOCAL DECISIONS.

The contract of December 3, 1932, is a pledge with power of administration, creating a fiduciary relation between the parties, notwithstanding it was in the form of a completed sale. As to the old bank's real estate, it is a contract of antichresis under Article 3176 of the Revised Civil Code of Louisiana, which is in harmony with the general law of pledges. Said article reads in part as follows:

> "The creditor acquires by this contract the right of reaping the fruits or other revenues of the immovables to him given in pledge, on condition of deducting annually their proceeds from the interest, if any be due him, and afterwards from the principal of his debt."

In 49 C. J. 920, the rule as to the relation created between the parties by a contract of pledge, is stated as follows:

> "The duties and relations of a pledgor and pledgee are governed more by the general maxims of equity than by the strict rules of the common law. The very nature of the transaction gives rise to a trust relation between the pledgor and pledgee, with its consequent duties to protect the debt or obligation and the collateral. For the purposes of the pledge, the pledgee holds the pledged property in trust first for himself to the extent of his claim and then for the pledgor."

In 49 C. J. 944, we find the rule governing income, profits and advantages derived by pledgee from property held in pledge to be:

> "The pledgee must account to the pledgor for all the income, profits and advantages derived by him from the pledged property."

In 41 Am. Jur., Pledge and Collateral Security, § 33, the law of pledges is thus stated:

> "***** If, from the use of the property pledged, profits are derived, the pledgee must, in the absence of a special agreement to the contrary, account therefor to the pledgor, and apply the net proceeds of such use to the extinction of the debt."

In Calderwood v. Calderwood, 23 La. Ann. 658, the court held that the sale of an immovable to secure a debt

was a contract of antichresis and governed by Article 3176 of the Civil Code, saying:

> "William Calderwood holds the property, which is immovable, by a contract of pledge, disguised, however, under the form of a sale. It is an antichresis by which contract he acquires—'the right of reaping the fruits or other revenues of the immovables to him given in pledge on condition of deducting annually their proceeds from the interest, if any be due him, and afterwards from the principal of his debt.' Revised Civil Code, Article 3176."

In Ware & Son v. Morris, 23 La. Ann. 665, the court said:

> "No doubt it is lawful to secure a debt under an apparent act of sale, but it is nevertheless a pledge or hypothecary right concealed, however, behind the false appearance of the contract of sale. In such a case the title never passes; the real contract may be a pledge or mortgage—the apparent one a sale."

In Gautreaux v. Harang, 183 So. 349, the Supreme Court of Louisiana reviewed the jurisprudence on the law of antichresis, quoting with approval Calderwood v. Calderwood and Ware & Son v. Morris, cited supra.

In Conklin v. Caffall, 179 So. 434, the Supreme Court of Louisiana said:

> "It is sufficient to say that, as an antichresis is only an ancillary contract, it must have a debt or principal obligation to support it—whether the obligation be a pre-existing one or be incurred in the making of the antichresis."

In 25 C. J. 1120, the law applicable to fiduciaries is stated in the following language:

"It is a well-settled equitable rule that any one acting in a fiduciary relation shall not be permitted to make use of that relation to benefit his own personal interest, except with the full knowledge and consent of the other person, and such other person must be in possession of all his powers before he can be bound by that knowledge or consent. When a fiduciary relation is established between parties, courts of equity scrutinize very closely any transactions between the parties by which the dominant party secures any profit or advantage at the expense of the person under his influence. All transactions between parties in this relation are presumptively fraudulent and void."

The above quotation is the law applicable to this case, fortified through the centuries, and refortified by the restatements of the law of all fiduciaries and fiduciary relations by the American Law Institute.

The law of fiduciaries is not merely "an accumulation of legal futilities." It is a part of the plain unchallenged law about which Chief Justice Hughes was talking in his last address to the American Law Institute when he said:

"It is the privilege and duty of the judiciary to demonstrate the capacity of Democratic government to have the peoples' laws administered without 'an evil eye and unequal hand'****The lamps of Justice are dimmed or have wholly gone out in many parts of the earth, but these lights are still shining brightly here. We are engaged in harnessing our national power for the defense of our way of life. But that way is worthwhile only because it is the pathway of the just. It is our high privilege, although our task may seem prosaic, to strengthen the defenses of Democracy by commending to public confidence and esteem the working of the institutions of justice in both state and nation."

III

UPON REVERSING DECREE OF DISTRICT COURT CIRCUIT COURT OF APPEALS HAS POWER AND RIGHT AND IT IS ITS DUTY TO REMAND THE CASE TO THE LOWER COURT WITH INSTRUCTIONS FOR FURTHER PROCEEDINGS.

In 28 U. S. C. A. § 877, it is provided:

> "Whenever on appeal or writ of error or otherwise a case coming from a district court shall be reviewed and determined in the circuit court of appeals in a case in which the decision in the circuit court of appeals is final such cause shall be remanded to the said district court for further proceedings to be there taken in pursuance of such determination."

The appellant bank prayed for and obtained a reversal of the decree of the District Court for two of five errors assigned by it, the Circuit Court of Appeals saying in its original opinion:

> "Its third assignment of error relates to the denial of service charges for administering Class C assets. Its fourth deals with its right to reimbursement for a pro rata share of expenses and salaries in administering Class C assets. Appellant is obtaining a reversal of the judgment on assignments three and four. Our power to reverse and remand generally on these two grounds is beyond question. Except as otherwise directed by us, this case will go back to the district court as if the former trial had not taken place."

The Court further said:

> "Having sought reversal of the judgment, appellant cannot complain of the action of the court on errors assigned by it."

IV

DECISION OF CIRCUIT COURT OF APPEALS WITH RESPECT TO ONE MILLION DOLLAR NOTE IS NOT INCONSISTENT WITH DECISIONS OF OTHER CIRCUIT COURTS OF APPEALS.

In support of its contention that the ruling of the Circuit Court of Appeals on the note for one million dollars is inconsistent with decisions of other Circuit Courts of Appeals, the appellant bank cites the following authorities:

Aberly v. Craven County, Fourth District, 70 F. (2d) 52;

Somerset Academy v. Picher, First Circuit, 90 F. (2d) 741.

In each of the cases cited, the bank was insolvent and the note involved therein was given as a symbol of the shareholders' liability for the difference between the sound assets of the bank and its liabilities, as the court said in the Picher case, from which we quote:

> "Counsel also lays stress on the fact that the note given was in excess of the capital stock of the bank, but the note was not given to create a new debt, but was simply an acknowledgement of a deficiency found to exist between its sound assets and liabilities, with a pledge of certain doubtful assets to secure the payment, the proceeds thereof to be credited on the note. Richter et al. v. Laredo National Bank (C. C. A.) 62 F. (2d) 289."

In the case at bar, the bank was not insolvent when it was closed and placed in liquidation on December 3, 1932, or when the receiver was appointed on February 21, 1936,

or ever at any other time, as shown by its financial statements of December 1, 1932 (Tr. 341), December 2, 1932 (Tr. 343), December 3, 1932 (Tr. 345), and as further shown by the result of the liquidation through the receivership, which produced sufficient cash to discharge all of its liabilities and to pay the appellant bank $1,314,743.65 (Tr. 682), leaving on hand cash and other assets valued by the court at $509,114.49. Besides, the cost of the receivership is approximately $100,000.00, and there were heavy losses sustained by forced liquidation of its real estate.

Alternatively, if the court should hold that the ruling of the Circuit Court of Appeals with respect to said note was inconsistent with the decisions cited by the appellant bank, such inconsistency would be immaterial for the reason that certiorari will not be granted because of conflict among Circuit Courts of Appeals on questions controlled by state law.

In the case at bar, the appellant bank contends, as stated in its brief, page vii, that the law of Louisiana controls all issues presented; and the court so held, its opinion as reported in 144 F. (2d) 231, reading as follows:

> "This is an action for an accounting under a contract that was made in Louisiana and was to be performed there. It involves a controversy between two national banks, but its correct decision upon all issues depends upon the law of Louisiana."

In Ruhlin v. New York Life Insurance Company, 304 U. S. 202; 82 L. Ed. 1290, the court said:

> "As to questions controlled by state law, however,

conflict among circuits is not of itself a reason for granting a writ of certiorari."

Wherefore, for all reasons assigned, we urge that the petition for certiorari should be denied.

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Of Counsel.